STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN HOUSE OF REPRESENTATIVES and MICHIGAN SENATE,

Plaintiffs-Appellants/
Cross-Appellees,

v

GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan,

Defendant-Appellee/
Cross-Appellant.
_____/

Supreme Court No. 161377

Court of Appeals No. 353655

Court of Claims No. 20-79-MZ

**The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.**

# GOVERNOR GRETCHEN WHITMER'S EMERGENCY BYPASS APPLICATION FOR LEAVE TO APPEAL AND BRIEF IN RESPONSE TO PLAINTIFFS' EMERGENCY BYPASS APPLICATION FOR LEAVE TO APPEAL

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Dated: May 29, 2020

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## STATEMENT OF JURISDICTION

The Michigan House of Representatives and Michigan Senate (Legislative Plaintiffs) sought an immediate declaratory judgment that Governor Whitmer exceeded her authority under the Emergency Powers of the Governor Act (EPGA) and the Emergency Management Act (EMA) during the COVID-19 pandemic. MCL 10.31 et seq; MCL 30.401 et seq.

The Court of Claims issued an opinion denying Plaintiffs' request for declaratory relief and entered a final order. (5/21/20 Ct of Claims Op and Order, p 25.) In its opinion, the Court of Claims found that the Governor's declaration pf emergency and accompanying executive orders constituted a valid exercise of her authority under the EPGA. (*Id.* at 2.)

The Court of Claims also determined that the Legislative Plaintiffs have standing in this case (*id.* at 4–9), and that the Governor acted outside of her authority when issuing Executive Order 2020-68 pursuant to the EMA, (*id.* at 2, 19–25.) The Governor seeks leave to appeal these adverse rulings.

The Plaintiffs filed a claim of appeal in the Court of Appeals on May 22, 2020, and later that day, in this Court, filed an emergency application for leave to appeal the Court of Claims decision "before a decision of the Court of Appeals" (bypass application). MCR 7.305(B)(2). The Governor similarly filed a cross-claim of appeal on May 29, and here files an omnibus response to the Legislative Plaintiffs' bypass application and bypass application regarding the two adverse rulings against her.

The Governor asks this Court to grant her bypass application and the Legislative Plaintiffs' bypass application, and to hear them on an expedited basis.

## STATEMENT OF QUESTIONS PRESENTED[1]

1. Legislative standing is available only where the body suffers an injury specific to it or to protect its legal rights. The House and Senate allege only injuries shared with the general citizenry, and any decision by this Court will not affect their constitutional authority to legislate. Do the Legislative Plaintiffs have standing?

   Governor's answer: No.

   Legislative Plaintiffs' answer: Yes.

   Court of Claims answer: Yes.

   Court of Appeals' answer: Did not answer.

2. The Emergency Powers of the Governor Act grants broad authority to the Governor to declare a state of emergency during great public crises where public safety is imperiled within the State. The Governor declared a state of emergency in response to a worldwide public health pandemic that has killed thousands of Michiganders. Did the Governor act within her statutory grant of authority?

   Governor's answer: Yes.

   Legislative Plaintiffs' answer: No.

   Court of Claims answer: Yes.

   Court of Appeals' answer: Did not answer.

[1] Issues 2 and 3 are the subject of the Legislative Plaintiffs' bypass application, and Issues 1 and 4 are the subject of the Governor's bypass application as well as alternative bases to affirm the lower court's decision in response to the Plaintiffs' bypass application.

3. The Emergency Powers of the Governor Act permits the Governor during public crises to issue "reasonable" orders "necessary to protect life and property" or bring the emergency under control. The Legislature may constitutionally grant broad authority to the executive branch provided there is sufficient guidance in light of the purpose of the delegation. Have the Legislative Plaintiffs proven their own law is an unconstitutional delegation?

| | |
|---|---|
| Governor's answer: | No. |
| Legislative Plaintiffs' answer: | Yes. |
| Court of Claims answer: | No. |
| Court of Appeals' answer: | Did not answer. |

4. The Emergency Management Act requires a Governor to declare a state of emergency or disaster if the conditions in the State warrant it, and to terminate those specific declarations if the Legislature does not extend them beyond 28 days by concurrent resolution. The Governor terminated unextended declarations, but issued new ones pursuant to her ongoing statutory duty. Did the Governor act within her authority under the EMA?

| | |
|---|---|
| Governor's answer: | Yes. |
| Legislative Plaintiffs' answer: | No. |
| Court of Claims answer: | No. |
| Court of Appeals' answer: | Did not answer. |

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

### Constitutional Provisions

Const 1963, art 5, § 1 provides:

> Except to the extent limited or abrogated by article V, section 2, or article IV, section 6, the executive power is vested in the governor.

Const 1963, art 4, § 26 provides, in pertinent part:

> No bill shall be passed or become a law at any regular session of the legislature until it has been printed or reproduced and in the possession of each house for at least five days. Every bill shall be read three times in each house before the final passage thereof. No bill shall become a law without the concurrence of a majority of the members elected to and serving in each house.

Const 1963, art 4, § 33 provides, in pertinent part:

> Every bill passed by the legislature shall be presented to the governor before it becomes law, and the governor shall have 14 days measured in hours and minutes from the time of presentation in which to consider it. If he approves, he shall within that time sign and file it with the secretary of state and it shall become law. If he does not approve, and the legislature has within that time finally adjourned the session at which the bill was passed, it shall not become law. If he disapproves, and the legislature continues the session at which the bill was passed, he shall return it within such 14-day period with his objections, to the house in which it originated. That house shall enter such objections in full in its journal and reconsider the bill. If two-thirds of the members elected to and serving in that house pass the bill notwithstanding the objections of the governor, it shall be sent with the objections to the other house for reconsideration. The bill shall become law if passed by two-thirds of the members elected to and serving in that house.

## Pertinent Provisions of the Emergency Powers of the Governor Act

MCL 10.31 provides:

> (1) During times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled, either upon application of the mayor of a city, sheriff of a county, or the commissioner of the Michigan state police or upon his or her own volition, the governor may proclaim a state of emergency and designate the area involved. After making the proclamation or declaration, the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control. Those orders, rules, and regulations may include, but are not limited to, providing for the control of traffic, including public and private transportation, within the area or any section of the area; designation of specific zones within the area in which occupancy and use of buildings and ingress and egress of persons and vehicles may be prohibited or regulated; control of places of amusement and assembly and of persons on public streets and thoroughfares; establishment of a curfew; control of the sale, transportation, and use of alcoholic beverages and liquors; and control of the storage, use, and transportation of explosives or inflammable materials or liquids deemed to be dangerous to public safety.
>
> (2) The orders, rules, and regulations promulgated under subsection (1) are effective from the date and in the manner prescribed in the orders, rules, and regulations and shall be made public as provided in the orders, rules, and regulations. The orders, rules, and regulations may be amended, modified, or rescinded, in the manner in which they were promulgated, from time to time by the governor during the pendency of the emergency, but shall cease to be in effect upon declaration by the governor that the emergency no longer exists.

MCL 10.32 provides:

> It is hereby declared to be the legislative intent to invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster. The provisions of this act shall be broadly construed to effectuate this purpose.

## Pertinent Provisions of the Emergency Management Act

MCL 30.402(e) provides:

> "Disaster" means an occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or human-made cause, including, but not limited to, fire, flood, snowstorm, ice storm, tornado, windstorm, wave action, oil spill, water contamination, utility failure, hazardous peacetime radiological incident, major transportation accident, hazardous materials incident, epidemic, air contamination, blight, drought, infestation, explosion, or hostile military action or paramilitary action, or similar occurrences resulting from terrorist activities, riots, or civil disorders.

MCL 30.402(h) provides:

> (h) "Emergency" means any occasion or instance in which the governor determines state assistance is needed to supplement local efforts and capabilities to save lives, protect property and the public health and safety, or to lessen or avert the threat of a catastrophe in any part of the state.

MCL 30.402(p) provides:

> (p) "State of disaster" means an executive order or proclamation that activates the disaster response and recovery aspects of the state, local, and interjurisdictional emergency operations plans applicable to the counties or municipalities affected.

MCL 30.402(q) provides:

> (q) "State of emergency" means an executive order or proclamation that activates the emergency response and recovery aspects of the state, local, and interjurisdictional emergency operations plans applicable to the counties or municipalities affected.

MCL 30.403 provides:

> (1) The governor is responsible for coping with dangers to this state or the people of this state presented by a disaster or emergency.
>
> (2) The governor may issue executive orders, proclamations, and directives having the force and effect of law to implement this act. Except as provided in section 7(2), an executive order, proclamation, or directive may be amended or rescinded by the governor.

(3) The governor shall, by executive order or proclamation, declare a state of disaster if he or she finds a disaster has occurred or the threat of a disaster exists. The state of disaster shall continue until the governor finds that the threat or danger has passed, the disaster has been dealt with to the extent that disaster conditions no longer exist, or until the declared state of disaster has been in effect for 28 days. After 28 days, the governor shall issue an executive order or proclamation declaring the state of disaster terminated, unless a request by the governor for an extension of the state of disaster for a specific number of days is approved by resolution of both houses of the legislature. An executive order or proclamation issued pursuant to this subsection shall indicate the nature of the disaster, the area or areas threatened, the conditions causing the disaster, and the conditions permitting the termination of the state of disaster. An executive order or proclamation shall be disseminated promptly by means calculated to bring its contents to the attention of the general public and shall be promptly filed with the emergency management division of the department and the secretary of state, unless circumstances attendant upon the disaster prevent or impede its prompt filing.

(4) The governor shall, by executive order or proclamation, declare a state of emergency if he or she finds that an emergency has occurred or that the threat of an emergency exists. The state of emergency shall continue until the governor finds that the threat or danger has passed, the emergency has been dealt with to the extent that emergency conditions no longer exist, or until the declared state of emergency has been in effect for 28 days. After 28 days, the governor shall issue an executive order or proclamation declaring the state of emergency terminated, unless a request by the governor for an extension of the state of emergency for a specific number of days is approved by resolution of both houses of the legislature. An executive order or proclamation issued pursuant to this subsection shall indicate the nature of the emergency, the area or areas threatened, the conditions causing the emergency, and the conditions permitting the termination of the state of emergency. An executive order or proclamation shall be disseminated promptly by means calculated to bring its contents to the attention of the general public and shall be promptly filed with the emergency management division of the department and the secretary of state, unless circumstances attendant upon the emergency prevent or impede its prompt filing.

MCL 30.417 provides, in pertinent part:

> This act shall not be construed to do any of the following:
>
> * * *
>
> (d) Limit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant to Act No. 302 of the Public Acts of 1945, being sections 10.31 to 10.33 of the Michigan Compiled Laws, or exercise any other powers vested in him or her under the state constitution of 1963, statutes, or common law of this state independent of, or in conjunction with, this act.

## INTRODUCTION

The Legislative Plaintiffs come to the judiciary seeking only to build a constitutional crisis atop a public health crisis in Michigan. The law requires putting that effort to rest.

Unfortunately, the scourge of COVID-19 will not lie down. The novel coronavirus that causes COVID-19 has rapidly spread across the planet, infecting millions, and killing hundreds of thousands in just a few months. In response, jurisdictions the world over have imposed bold measures to stem the viral tide that has overwhelmed healthcare systems.

At home, Michigan is one of the states hardest hit by the pandemic. Since March 18, COVID-19 has claimed at least 5,372 lives, and countless others have suffered the excruciating health effects of the virus. Through wicked happenstance of this novel virus, many who are infected escape symptoms but unwittingly spread the virus to others, who may end up on ventilators, or worse. Such disparities still perplex medical experts, which only highlights the uncertainty ahead.

In response to the threat of the pandemic, Governor Gretchen Whitmer declared states of emergency and disaster. Consistent with her duties to protect the health and welfare of the State and its citizens and respond to emergencies within its borders, the Governor put measures in place to suppress the spread of the virus, incrementally loosening restrictions as the public health permits. Because of these efforts, the disease's spread has been slowed and countless lives have been saved. But the crisis is not over, and the virus remains highly contagious, still untreatable, and potentially poised for resurgence.

The Legislative Plaintiffs deny none of this, but ask this Court to invalidate the Governor's emergency response authority and declare their own delegation of this authority unconstitutional. Past Legislatures have thought better of putting a slow and fractious multi-member body in charge of responding to emergencies that demand a rapid, coordinated, and nimble response. Through two laws—the Emergency Powers of the Governor Act (EPGA) and the Emergency Management Act (EMA)—the Legislature vested such responsibility in the executive branch.

The Legislative Plaintiffs, of course, remain free to amend these laws, even over the Governor's objection, if they are dissatisfied with the authority generations have vested in the Governor or the Governor's due exercise of that authority. But they have not done so. The courts are not the proper branch for lawmaking, and the Legislative Plaintiffs lack standing to bring this suit. The Legislative Plaintiffs have failed to show a sufficient injury to an institutional interest, and their action against the Governor raises separation of powers concerns. Moreover, nothing in the declaratory relief they seek is necessary to guide their future conduct and preserve their legal rights—they only seek to affect the *Governor's* rights.

They fare no better on the merits of their challenges to the Governor's exercise of her emergency authority. Under the EPGA, the Legislature plainly granted the Governor authority to proclaim an emergency and reasonably guided her discretion in doing so. And while the Legislative Plaintiffs attempt to engraft limitations on this authority and cast doubt on its constitutionality, settled caselaw and the EPGA's plainly stated text make short work of those arguments, just as the

Court of Claims did. The Governor's declaration and reaffirmation of an emergency under the EPGA are valid, as are the executive orders issued under that authority.

Independently, the EMA contains authority that is activated upon the Governor's declaration of a state of emergency or disaster. Importantly, the EMA *requires* the Governor to issue those declarations if the conditions warrant it. If the declarations of states of emergency or disaster—which are defined by the act as "executive order[s]"—are not extended by the Legislature after 28 days, the Governor must terminate those executive orders. While the Court of Claims agreed with the Legislative Plaintiffs' contention that the Governor ignored this limitation, she in fact adhered closely to it and the EMA's other mandates—she timely terminated the earlier declarations and then issued new ones, consistent with her legal duty to do so when disaster or emergency conditions afflict our State.

The Legislative Plaintiffs frame the Governor's actions—particularly her new declarations—as unprecedented. But that flips the conversation on its head. The pandemic that Michigan is facing is unprecedented, as is the Legislative Plaintiffs' refusal to ratify the declarations the Governor issued—declarations whose factual basis they do not and cannot dispute. That refusal may be their right under the EMA, but the Governor's responsibility to act in response to the ongoing emergency and disaster remains her duty.

Even if this Court were to find that the Governor exceeded her authority under the EMA, that leaves her declaration under the EPGA undisturbed, as the

Court of Claims concluded. Because the Governor's declarations here work as a belt and suspenders, even if the belt is removed, the suspenders remain.

The Legislative Plaintiffs' overarching claim is that the Governor has acted beyond her constitutional role (despite the Legislature granting her the very authority she has invoked and exercised). Yet rather than act with their own most fundamental power—to amend the laws they now challenge—they filed suit. But there is no legal basis for this Court to upend the status quo in the midst of this public health crisis. The Constitution grants the Legislature the tools to do just that if it so chooses—to amend its own laws, by veto override if it must. This Court should not short circuit that route still available to the Legislature, one that runs through their own chambers.

This case warrant answers from this State's highest court because the issues involve the constitutional validity of the EPGA, MCR 7.305(B)(1), have "significant public interest," MCR 7.305(B)(2), and touch on the Governor's emergency authority and the propriety of the Legislative Plaintiffs' standing, MCR 7.305(B)(3). Although the status quo will not cause substantial harm to the public because the Governor's measures to protect the public health remain valid under the decision below, MCR 7.305(B)(4)(a), the Governor's full authority to respond to a public crisis is currently undercut by part of the Court of Claims ruling, MCR 7.305(B)(4)(b).

The Governor asks this Court to grant her bypass application, and agrees that the Court should grant Legislative Plaintiffs' own bypass application, to decide these important and consequential questions.

## STATEMENT OF FACTS AND PROCEEDINGS

**COVID-19 infects the globe.**

SARS-CoV-2 is similar to other coronaviruses (a large family of viruses that cause respiratory illnesses), but the strain is "novel," *i.e.*, never-before-seen. This means that there is no general or natural immunity built up in the population, no vaccine, and no known treatment to combat the virus itself.

It is widely known and accepted that the virus is highly contagious, spreading easily from person to person via "respiratory droplets."[2] Experts agree that being anywhere within six feet of an infected person puts you at a high risk of contracting the disease, called COVID-19.[3] But even following that advice is not a sure-fire way to prevent infection. The respiratory droplets from an infected person can land on surfaces, and be transferred many hours later to the eyes, mouth, or nose of others who touch the surface. Moreover, since many of those infected experience no symptoms or only mild ones, a person could spread the disease before he even realizes he is sick.[4] Everyone is vulnerable either as a potential victim of this scourge or a carrier of it to a potential victim.

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[2] World Health Organization, *Modes of transmission of virus causing COVID-19*, available at https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations.

[3] Centers for Disease Control, *Social Distancing, Quarantine, and Isolation*, available at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html.

[4] (*Id.*)

Because there is no way to immunize or treat for COVID-19, the Centers for Disease Control and Prevention have indicated the best way to prevent illness is to "avoid being exposed."[5] And as experience from prior pandemics such as smallpox and the 1918 Spanish Influenza have indicated, early intervention to slow transmission is critical.

In keeping with this advice, governmental entities have stressed the critical import of "social distancing," the practice of avoiding public spaces and limiting movement.[6] The objective of social distancing is what has been termed "flattening the curve," that is, reducing the speed at which COVID-19 spreads. If the disease spreads too quickly, the limited resources of our healthcare system could easily become overwhelmed.[7]

**Michigan is hit hard by the expanding epidemic and the Governor declares states of disaster and emergency.**

On March 10, 2020, in response to the growing pandemic in Michigan, Governor Whitmer declared a state of emergency and invoked the emergency powers available to the Governor under Michigan law—pursuant to her authority under the Emergency Powers of the Governor Act (EPGA), the Emergency Management Act (EMA), and Article 5, § 1.[8]

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[5] (*Id.*)

[6] (*Id.*)

[7] See *New York Times, Flattening the Coronavirus Curve* (March 27, 2020), available at https://www.nytimes.com/article/flatten-curve-coronavirus.html.

[8] Executive Order 2020-4, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521576--,00.html.

On March 13, 2020, Governor Whitmer issued an executive order prohibiting assemblages of 250 or more people in a single shared space with limited exceptions, and ordering the closure of all K-12 school buildings.[9] Yet, even in the face of the social distancing recommendations and the six-foot rule of thumb, on Saturday, March 14, the public was out in droves. On March 16, 2020, the Governor ordered various places of public accommodation, like restaurants, bars, and exercise facilities, to close their premises to the public.[10]

Subsequently, on March 23, 2020, again in response to the spreading pandemic in Michigan, Governor Whitmer issued an executive order which essentially ordered all persons not performing essential or critical infrastructure job functions to stay in their place of residence, other than to obtain groceries, care for loved ones, engage in outdoor activity consistent with social distancing, and other limited exceptions (the Stay Home Order).[11] Several other orders intended to address the pandemic in Michigan were issued pursuant to her authority under the EPGA and the EMA.[12]

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[9] Executive Order 2020-5, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521595--,00.html.

[10] Executive Order 2020-9, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521789--,00.html. (Replaced by Executive Order 2020-20).

[11] Executive Order 2020-21, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--,00.html. That order was to continue through April 13, 2020; however, on April 9, 2020, the Governor issued Executive Order 2020-42, extending the Stay Home Order through April 30, 2020, at midnight. Executive Order 2020-42, available at https://content.govdelivery.com/attachments/MIEOG/2020/04/09/file_attachments/1423850/EO%202020-42.pdf.

[12] See generally "Executive Orders" http://www.legislature.mi.gov/(S(wskfimad5qtw1lrxuwq3z3jb))/mileg.aspx?page=executiveorders

On April 1, the Governor issued Executive Order 2020-33, which expanded upon the prior declaration of a state of emergency and, consistent with the virus's aggressive and destructive spread, declared states of emergency and disaster across the State of Michigan. Under the EMA (though not the EPGA), the declarations must be terminated after 28 days absent resolution by both houses of the Legislature. MCL 30.403(3), (4). On April 7, the Michigan House and Senate approved an extension of the Governor's declaration until April 30, 2020.[13]

**As required by the EMA, the Governor terminates the states of emergency and disaster under the EMA after the Legislature refuses to extend them.**

Prior to April 30, the Governor again asked the Legislature to extend the states of disaster and emergency under the EMA pursuant to MCL 30.403(3) and (4), but the Legislature did not do so. Notably, neither in public statements nor in its pleading to this Court have the Legislative Plaintiffs expressed disagreement that the conditions persist that warrant declarations of emergency and disaster.[14]

On April 30, 2020, then, the Governor issued three executive orders. First, in Executive Order 2020-66 (App'x A), the Governor terminated the executive orders of states of emergency and disaster declared under the EMA as required by MCL 30.403(3) and (4) because the Legislature refused to extend those executive orders.

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[13] 2020 SCR 24.

[14] To the contrary, the Senate Majority Leader, the very morning after refusing to extend the prior declarations, responded with indignation when asked if the emergency was over: "No, not at all. Hell—heck no. I'd like to know where you would even come up with that question." See https://jtv.tv/senate-majority-leader-shirkey-on-legislative-showdown/ (thirty seconds into the interview).

Although noting that "the threat and danger posed to Michigan by the COVID-19 pandemic has by no means passed, and the disaster and emergency conditions it has created very much exist," the Governor recognized that the Legislature—"despite the clear and ongoing emergency and disaster conditions afflicting our state—has refused to extend [the states of emergency and disaster] beyond today." *Id*. Accordingly, she was required by the EMA's plain language to issue an order "terminat[ing]" the states of emergency and disaster. *Id.*

**Because the COVID-19 crisis persists, the EMA requires her to declare a state of disaster and emergency, which she promptly does.**

After terminating the prior declarations, the Governor again declared a state of emergency and a state of disaster under the EMA. Executive Order 2020-68 (App'x B). She also explained the basis for this new declaration. Although the measures issued pursuant to her emergency authority had been working, "the need for them—like the unprecedented crisis posed by this global pandemic—is far from over." *Id.* COVID-19, she said,

> remains present and pervasive in Michigan, and it stands ready to quickly undo our recent progress in slowing its spread. Indeed, while COVID-19 initially hit Southeast Michigan hardest, the disease is now increasing more quickly in other parts of the state. For instance, cases in some counties in Western and Northern Michigan are now doubling every 6 days or faster. [*Id.*]

The Governor further found, "[t]he health, economic, and social harms of the COVID-19 pandemic thus remain widespread and severe, and they continue to constitute a statewide emergency and disaster." *Id.* Accordingly, the Governor stated: "I now declare a state of emergency and a state of disaster across the State

of Michigan under the Emergency Management Act." *Id.* Finally, the Governor ordered that "[a]ll previous orders that rested on Executive Order 2020-33 now rest on this order." *Id.*

**The Governor reaffirms her declaration of the state of emergency under the EPGA.**

In the third Executive Order issued that day, the Governor reaffirmed the state of emergency under the EPGA, ordering that "[a] state of emergency remains declared across the State of Michigan under the Emergency Powers of the Governor Act of 1945." Executive Order 2020-67 (App'x C). And like in Executive Order 2020-68, she ordered "Executive Order 2020-33 is rescinded and replaced. All previous orders that rested on Executive Order 2020-33 now rest on this order." *Id.*

**The Court of Claims denies declaratory relief and affirms the Governor's authority under the EPGA.**

The Legislative Plaintiffs brought suit, seeking an expedited declaratory judgment that the Governor's authority to act under the EMA ended April 30, 2020; the EPGA does not provide authority for the Governor's COVID-19 executive orders; the Governor has no lawmaking power under Const 1963, art 5, § 1; and the Governor's ongoing COVID-19 executive orders violate the separation of powers. (Compl Request for Relief.)

On May 21, 2020, the Court of Claims issued an opinion and order denying the Plaintiffs' requested relief. (5/21/20 Op and Order, p 25) (App'x D). First, the Court of Claims determined that the Legislative Plaintiffs have standing, but

deemed it a "close question." (*Id.* at 7.) The court construed the Legislative Plaintiffs' claimed injury as being "that EO 2020-67 and EO 2020-68 nullified the decision of the Legislature to not extend the state of emergency or disaster." (*Id.* at 8.) More specifically, the court found the Legislative Plaintiffs' allegation to be "the Governor eschewed the Legislature's role under the EMA and nullified an act of the legislative body as a whole," an injury "unique to the Legislature." (*Id.* at 8–9.)

The court also held that that Executive Order 2020-67 (the EPGA declaration) was a valid exercise of the "broad authority" by the Governor. (*Id.* at 10.) The court rejected the Legislative Plaintiffs' "attempt to limit the scope of the EPGA to local or regional emergencies only," relying heavily on the Legislature's plain statutory purpose in MCL 10.32 to confer " 'sufficiently broad power' on the Governor in order to enable her to respond to public disaster or crisis." (*Id.* at 11, quoting MCL 10.32.) The court rejected the attempt to impose "artificial barriers on the Governor's authority to act," noting that a "particularly strained reading of the plain text of the EPGA" was required to reach the Legislative Plaintiffs' result. (*Id.* at 12.) Recognizing the Legislative Plaintiffs' "selectively rely on parts of the statute and ignore the contextual whole," the court affirmed the Governor's authority to issue state-wide declarations under the EPGA. (*Id.* at 13–14.)

The court had no difficulty squaring this reading with the existence of the EMA, explaining that "while both statutes permit the Governor to declare an emergency, the EMA equips the Governor with more sophisticated tools and options at her disposal." (*Id.* at 14.) And, citing MCL 30.417(d)—which makes clear that

the EMA does not "[l]imit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant to [the EPGA]"—the court relied on the Legislature's own textual "explicit recognition" in refusing to narrow the EPGA or the EMA as the Legislative Plaintiffs desire. (*Id.* at 15.)

The court also denied the Legislative Plaintiffs' request to declare the EPGA unconstitutional as violative of the separation of powers. The court properly balanced the complexity of the underlying subject matter—response to an unknown future emergency situation—with the sufficient guidance the Legislature provided. (*Id.* at 16–18.) As the court summed up, citing several Michigan decisions:

> The Legislature's use of the terms "reasonable" and "necessary" are not trivial expressions that can be cast aside as easily as plaintiffs would have the Court do. Rather than being mere abstract concepts that fail to provide a meaningful standard, the terms "reasonable" and "necessary" have historically proven to provide standards that are more than amenable to judicial review. [*Id.* at 18.]

Given the validity of the EPGA and the validity of the Governor's declaration under it, the Court of Claims "conclude[d] that plaintiffs have failed to establish a reason to invalidate Executive Orders that rely on the EPGA." (*Id.* at 19.) The court, again, denied the relief requested by the Legislative Plaintiffs. (*Id.* at 25.)

Even though the court denied Legislative Plaintiffs' relief, the opinion determined that the Governor acted outside of her authority with respect to her April 30 declarations under the EMA. See Op and Order, pp 2–3 ("This court finds that . . . Executive Order No. 2020-68 exceeded the authority of the Governor under the EMA."); p 19 ("The Legislature contends that the issuance of EO 2020-68 was ultra vires, and this Court agrees" that 2020-68 is ultra vires).

After describing the broad authorities a Governor has under the EMA, the court accurately noted that, in Executive Order 2020-66, the Governor "expressly terminated the previously issued states of emergency and disaster—not because the disaster or emergency condition ceased to exist—but because a period of 28 days had expired," which is consistent with the statutory language in MCL 30.403(3) and (4). As the court correctly put it, "The Governor *"shall"* terminate the state of emergency or disaster *unless* the Legislature grants a request to extend it." (*Id.* at 23.) But the court found the Governor's new declarations as contrary to that language, stating, "To adopt the Governor's interpretation of the statute would render nugatory the express 28-day limit." (*Id.* at 24.) The court also disagreed that, construed in this way, the 28-day limit is an unconstitutional legislative veto, describing it as "a standard imposed on the authority so delegated." (*Id.* at 25.)

## STANDARD OF REVIEW

This Court reviews questions of statutory and constitutional interpretation de novo. *Mich Dept of Transp v Tomkins*, 481 Mich 184, 190 (2008).

## ARGUMENT

### I. The Legislative Plaintiffs lack standing.

Dissatisfied by the Governor's issuance of Executive Orders 2020-67 and 2020-68, the Legislative Plaintiffs have a clear, unique, and powerful remedy: they can change the law, even over the Governor's objection. Instead, they have chosen to sue the Governor, asking for a judicial solution to a perceived legislative problem.

This, they cannot do. The Legislative Plaintiffs cannot claim an institutional interest in the enforcement of already-enacted legislation, and have not claimed an injury distinct from the citizenry at large. This Court should determine that the Legislative Plaintiffs lack standing.

### A. The Legislative Plaintiffs lack standing because they have no special interest in challenging the executive orders of the Governor that differs in any way from the general interest of the citizenry at large.

"Standing is the legal term used to denote the existence of a party's interest in the outcome of the litigation . . . ." *Allstate Ins Co v Hayes*, 442 Mich 56, 68 (1993) (citations omitted). A litigant meeting the requirements of MCR 2.605 "is sufficient to establish standing to seek a declaratory judgment." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372 (2010). Moreover, a litigant may have standing if it "has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large." *Id.* at 372.

As with an individual legislator, to establish standing, a legislative body must allege that it has been deprived of a cognizable interest peculiar to the body. *Tennessee General Assembly v US Dep't of State*, 931 F3d 499, 507 (CA 6, 2019), citing *Ariz State Legislature v Ariz Independent Redistricting Comm*, 135 S Ct 2652, 2664 (2015). Importantly, a "generalized grievance that the law is not being followed," is insufficient to establish standing. *Dodak v State Admin Bd*, 441 Mich 547, 556 (1993) (citation omitted); see also *League of Women Voters of Michigan v Secy of State*, ___ Mich App ___, ____ (Docket No. 350938), slip op at *6, app for lv pending 938 NW2d 244 (Mich 2020).

The Legislative Plaintiffs seek to nullify the Governor's acts of declaring states of emergency and disaster under the EMA and the EPGA. But constraining the Governor's executive authority will not affect the Legislature as an institution entrusted with passing laws. The Legislative Plaintiffs' success in this case would only infringe upon the separation of powers by invalidating the Governor's implementation of the law and her exercise of the powers vested in her by law. Indeed, that is explicitly the relief that the Legislative Plaintiffs seek. Under *League of Women Voters* and *Dodak*, they cannot obtain that relief here.

The Legislative Plaintiffs claim that the Governor's actions violate the EPGA and the EMA. But even if that were true (it is not), such an alleged injury is not personal or unique to them. As the court noted in *League of Women Voters*, "once the votes of legislators have been counted and the statute enacted, their special interest as lawmakers has ceased." ___ Mich App at ___; slip op at *7. So too here, once the Legislature passed its laws, it exercised its legislative power. Execution of the laws is the purview of the executive. Const 1963, art 5, §§ 1, 8.

The Legislative Plaintiffs fare no better by attempting to cast their claims as Michigan constitutional violations. Whether they frame the Governor's action as allegedly unlawful or unconstitutional, they lack standing to challenge the actions for the same reasons. In either instance, the alleged injury or deprivation is no different than that accruing to the ordinary citizen.[15]

[15] Below, Plaintiffs relied heavily on the *Arizona State Legislature* case for the proposition that a legislature has an interest in protecting its lawmaking power from infringement. (5/15/2020 Hr'g Tr, p 10.) But *Arizona State Legislature* merely

The Legislative Plaintiffs' case is that the Governor did not follow the EMA and EPGA when declaring states of emergency and disaster—a claim of statutory interpretation—and that their own law is unconstitutional. The Governor has not asserted an inherent authority to act with legislative authority, only that the Legislature granted her authority by statute, which she has exercised. By acting as she did, the Governor did not work any infringement upon or dilution of the Legislature's constitutional power to pass laws, or any other constitutionally granted authority. See *Tennessee Gen Assembly*, 931 F3d at 512 (noting that legislative standing is proper upon an allegation of "interference with a legislative body's specific powers . . . or a constitutionally assigned power").

To the contrary, the Legislature admittedly introduced dozens of bills during the pandemic (Compl, ¶ 43), and is not hampered from continuing to do so. Any and all legislative tools remain on the table and available for amending or repealing the laws on the books. That the Governor may *also* act (per the Legislature's own delegation), does not squeeze out the Legislature from acting concurrently.

To sum it up, per the Court of Appeals in *League of Women Voters*:

> [T]he Legislature is suing to reverse actions by the [Governor], a member of the Executive Branch. The Legislature is thus plainly challenging the actions of members of the Executive Branch. *Dodak* stands for the proposition that courts should not confer standing in

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stands for the proposition that, where a legislative body alleges that it is effectively *barred* from exercising its constitutional authority, it has standing. *Id.* at 2663–2664; see also *Tennessee Gen Assembly*, 931 F3d at 511 (explaining that state legislatures had been found to have standing when they "alleged that an action at the state legislative level had interfered with their federal constitutional prerogatives"). That is miles from this case.

> matters that have the real possibility of infringing upon the separation of powers. [*League of Women Voters*, slip op at *7.]

And *League of Women Voters* is all the more persuasive on this point because, in that case, the Legislature sought to *protect* the constitutionality of its laws. ___ Mich App at ___; slip op at *9 ("To accept the Legislature's argument that it has standing here would open the door for the Legislature to seek a declaratory judgment whenever the constitutionality of a statute was challenged."). Here, the Legislative Plaintiffs ask this Court to *invalidate one of its own laws*, seeking a declaration that the EPGA is unconstitutional. If the Legislature lacks standing to attempt to enforce its own laws, it must lack standing to nullify them.

Finally, there is no room for concern in this case that, without standing for these plaintiffs, the executive's actions might evade judicial review.[16] A private party would have standing to challenge the Governor's declarations if the litigant could point to an alleged harm stemming from one of the Governor's substantive executive orders premised on her declarations under the EMA and/or the EPGA.

### B. The Legislative Plaintiffs cannot meet their obligation to show that an actual controversy exists under MCR 2.605.

Nor can the Legislative Plaintiffs generate standing by framing their claims as requests for declaratory relief. MCR 2.605 states that "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory

[16] See e.g., *League of Women Voters of Michigan v Secretary of State* (Docket No 160907-8), March 11, 2020 Oral Argument, Viviano, J., questioning at 52:26. Available at https://www.youtube.com/watch?v=9_AxvQNoa_4

judgment." Where no such actual controversy exists, a plaintiff does not have standing to bring a declaratory action. *City of South Haven v Van Buren Cty Bd of Comm'rs*, 478 Mich 518, 533–534 (2007).

"In general, 'actual controversy' exists where a declaratory judgment or decree is *necessary to guide a plaintiff's future conduct in order to preserve his legal rights*." *Shavers v Attorney General*, 402 Mich 554, 588 (1978) (emphasis added). See also *Assoc Builders & Contractors v Dep't of Consumer & Indus Servs Director*, 472 Mich 117, 126 (2005), overruled in part on other grds, 487 Mich at 371 n 18.

Here, the gravamen of the Legislative Plaintiffs' complaint is that they passed laws that are not being followed by the Governor, or that their own law (the EPGA) violates the Michigan Constitution. But if that were enough to create an actual controversy, the Legislature would have standing to bring a lawsuit against any government entity that has allegedly violated the Constitution or failed to enforce or comply with a statute. That outcome would be both an abuse of the court system and an improper curtailing of the legislative and political processes.

Nor do the Legislative Plaintiffs adequately explain how declaratory relief is needed here to guide their future conduct in order to preserve their *legal* rights. *Lansing Sch Ed Ass'n,* 293 Mich App at 515. To be sure, the future conduct that the Legislative Plaintiffs seek to "guide"—that is, curtail—is the that of the Governor, not the Legislature. The law does not provide standing for the Legislature to seek declaratory relief. As the Court of Appeals concluded in *League of Women Voters*:

> No declaratory judgment is necessary to guide the Legislature's future conduct in order to preserve its legal rights. The Legislature's

> authority to enact laws is separate and distinct from this Court's role in determining whether any law passes constitutional muster. These "rights" and obligations of the two separate branches of government will remain the same, no matter what the outcome in this matter, such that the preservation of the Legislature's legal rights is not at issue. [*League of Women Voters*, ___ Mich App at ___, slip op at *7.]

The Legislative Plaintiffs contend that they have a special right that is affected in a manner different from the citizenry at large in their right to enact legislation—but this is more spin than reality. There is nothing in the Governor's actions that interferes with the Legislature's ability to legislate. In fact, the complaint specifically alleges that the "Legislature has introduced almost 100 bills on COVID-19 related issues." (Compl, ¶ 43.) The Legislative Plaintiffs' claim for declaratory relief fails because there is no threat to their power to enact legislation, including their power to amend or repeal the very laws they challenge. [17]

In sum, the Legislative Plaintiffs' concern here is the Governor's actions, not infringement of its own institutional rights or responsibilities. They have no special interest in challenging the Governor's executive orders or advancing a strained interpretation of their own laws. Therefore, and in light of the separation-of-powers concerns pervading this suit, the Legislative Plaintiffs lack standing.

[17] The Michigan Constitution provides that "[n]o bill shall become law without the concurrence of a majority of the members elected to and serving in each house." Const 1963, art 4, § 26. "Every bill passed by the legislature shall be presented to the governor before it becomes law[.]" Const 1963, art 4, § 33. If the Governor vetoes a bill, the Legislature may override it by a two-thirds vote in each house. *Id.*

## II. The Governor has the authority under the EPGA to declare a state of emergency and to issue orders to protect the health and safety of the State and its people.

Even if the Legislative Plaintiffs could seek their requested relief from this Court, they have not shown entitlement to it. The EPGA grants the Governor broad police powers in times of public emergency to protect life and property and bring the emergency to its end.

### A. The State is generally granted broad latitude to respond to public health crises.

Faced with "great danger[ ]," state actors are permitted great latitude to secure the public health. *Jacobson v Commonwealth of Massachusetts,* 197 US 11, 29 (1905). In *Jacobson*, the Supreme Court considered a claim that the Massachusetts' mandatory vaccination law, which applied to every person in Cambridge due to a growing smallpox epidemic, violated the defendant's Fourteenth Amendment right "to care for his own body and health in such way as to him seems best." 197 US at 26. The Supreme Court upheld this sweeping, invasive measure as a proper exercise of the States' police power because of the exigencies and dangerousness of the public health crisis. It affirmed that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27. As the Court stated,

> in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand. [*Id.* at 29.]

In upholding the law, the Court refused to "usurp the functions of another branch of government" by second-guessing the executive's exercise of police power in such circumstances. *Id.* at 28. As *Jacobson* illustrates, the police power has long been recognized as a fundamental and central means by which States can respond in an effective fashion to an imminent threat to its citizens' health and safety.

### B. Consistent with the proper exercise of police power, the Legislature enacted the EPGA.

Through the EPGA, the Legislature has ensured that the Governor, who holds the executive power, has the necessary tools to deal with emergencies and disasters in this State, such as the crisis presented by COVID-19. Const 1963, art 5, § 1. The EPGA does not deprive the Legislature of any of its lawmaking tools or powers, and throughout this crisis, the Legislature has retained and been free to use them. But rather than exercise that lawmaking authority to amend the EPGA or EMA, the Legislative Plaintiffs asks this Court to misconstrue them.

#### 1. The EPGA's broad, but not unlimited, grant of authority supports the Governor's declared state of emergency.

The EPGA, enacted in 1945, provides the Governor with broad powers "[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state." MCL 10.31(1). The Governor "may proclaim a state of emergency" during these times, or upon "reasonable apprehension of immediate danger" of such an emergency, "when public safety is imperiled." *Id.*

Upon the proclamation of a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the

affected area under control." *Id.* Any "orders, rules, and regulations promulgated . . . are effective from the date and in the manner prescribed in the orders, rules, and regulations." MCL 10.31(2). And they "may be amended, modified, or rescinded . . . by the governor" and "shall cease to be in effect upon declaration by the governor that the emergency no longer exists." *Id.* As a whole, the EPGA must "be broadly construed to effectuate [its] purpose," which is to "invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster." MCL 10.32.

Our State is undoubtedly facing a "time[ ] of great public crisis," "disaster," or "similar public emergency," wherein "public safety is imperiled." MCL 10.31(1). The world over has been ravaged by the COVID-19 crisis, with serious, often fatal, consequences for many due to the virus's easy and rapid transmission. States of emergency exist across our country too, with orders effectuating social distancing. Since the virus's origin in China, it has traveled to nearly every country on Earth, killing over 350,000 people. Indeed, in April, it killed more Michiganders than heart disease and cancer combined.[18] As of filing, over 5,000 have died here, and over 100,000 have died in the United States.[19]

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[18] Michigan Department of Community Health, Number of Deaths by Select Causes of Death by Month, available at https://www.mdch.state.mi.us/osr/Provisional/MontlyDxCounts.asp

[19] *New York Times*, *An Incalculable Loss* (May 27, 2020), available at https://www.nytimes.com/interactive/2020/05/24/us/us-coronavirus-deaths-100000.html

These undisputed (and undisputable) facts form the basis of the Governor's finding that a state of emergency exists under the EPGA, and well justify the "reasonable" and "necessary" measures she has taken "to protect life" throughout the State and bring this pandemic "under control." MCL 10.31(1).

**2. The Legislative Plaintiffs' narrow construction of the EPGA is not borne out by the statute's plain language, and their heavy reliance on the alleged history of the act is misplaced.**

In an attempt to avoid the unfavorable result that flows from the EPGA's plain and straightforward text, the Legislative Plaintiffs strain to narrowly read their own statute, suggesting that the EPGA is limited to quelling riots and other uprisings of local concern. (Pls Bypass App, pp 20–24.) But this narrow construction is unwarranted for as many as six reasons.

*First*, such a limited reading is directly contrary to the Legislature's own (duly enacted) direction, which mandates that the act be "broadly construed to effectuate [its] purpose," which was plainly stated:

> It is hereby declared to be the legislative intent to invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster. [MCL 10.32.]

*Second*, the Legislative Plaintiffs proffer *a geographical limitation*—an interpretation of the statute that limits a declaration's reach to only local subsets of the State. (Pls Bypass App, pp 20–22) ("These words—'area,' 'zone,' and 'section'—all establish that the Governor's power is intended to reach some subpart of the state as a whole."). This is an attempt to recast the intended, and plainly stated,

flexibility of the EPGA as a limitation. The EPGA provides that, when declaring an emergency, the Governor must "designate the area involved." MCL 10.31(1). The EPGA then provides an illustrative, and expressly non-exhaustive, list of "orders, rules, and regulations" that the Legislature suggested may be appropriate in response to an emergency—which occasionally includes reference to "zones" or "section[s]," but just as often does not. *Id.*

All of this wisely recognizes that public emergencies, and necessary responses to them, may come in many different shapes and sizes, depending on the nature of the threat to public safety. And none of it suggests that the Governor, when faced with a statewide threat to public safety, cannot declare a state of emergency commensurate with that threat. Here, the "area" designated by the Governor is the entire State—and rightfully so, given the nature of the threat posed to this State (indeed the world) by this highly contagious, often fatal, and still untreatable virus. See MCL 10.31(1) (permitting a declaration during a "public emergency" or "reasonable apprehension of immediate danger of a public emergency").

Simply put, given the nature of this virus and the current limitations on our ability to test for, trace, and contain it, there is unquestionably a "reasonable apprehension of immediate danger of a public emergency" currently present in every portion of this State. MCL 10.31(1). The State is the "area involved," and

under the plainly stated language and intent of the EPGA, the Governor is fully authorized to designate that area and respond accordingly.[20]

Also, any claim that the EPGA is only designed to address local emergencies, and the EMA only statewide ones, is further belied by the language of the EMA. (Pls Bypass App, pp 15–20.) Just as the EPGA plainly accommodates emergencies statewide in scope, so too is the EMA filled with references to the authority for addressing local states of emergencies. It defines a "local state of emergency," MCL 30.402(j), grants local officials with the authority to declare such a state of emergency, MCL 30.410(1)(b), and provides guidance where a local emergency extends "beyond the control of the county," MCL 30.414(1). It also leads to the unfounded conclusion that, prior to the passage of the EMA in 1976, the law contemplated no means for the State to respond to a statewide emergency. The idea that the Governor would have had to issue 83 local emergency orders is not well taken, and is wholly unsupported by the text or express purpose of the EPGA. (See 5/22/20 Ct of Claims Op, p 12 ("Under plaintiffs' view, if that emergency became too large and it affected the entire state, the Governor would have to pick and choose which citizens could be assisted by the powers granted by the EPGA[.]").)

[20] Similarly misguided is the suggestion that a statewide declaration is contrary to the EPGA because it contemplates that the Governor may act during times of public emergency "within" the State. But even adopting the Legislative Plaintiffs' definition of "within"—" 'Within' means 'on the inside or on the inner-side' or 'inside the bounds of a place or region' " (Pls Bypass App, pp 20, ultimately quoting *Webster's Third New International Dictionary* 758 (1993))—the designated area meets that definition. The entirety of the state is "inside the bounds" of the State.

*Third*, like squeezing water from a stone, the Legislative Plaintiffs wish to engraft yet another limitation on the EPGA—let us call it the "rioting" limitation—in order to shrink the EPGA's authority to reach only local emergencies of a very specific sort. (Pls Bypass App, pp 17–18, 25.) This, too, fails. While the Legislative Plaintiffs' chosen specific term—rioting—is certainly covered by the EPGA, it sits adjacent "great public crisis," which is quite general (and perfectly applicable), as are "disaster" and "catastrophe." MCL 10.31. And the trusty canon of construction *ejusdem generis* is a handy reference, which applies "where a general term follows a series of specific terms," requiring "the general term [to be] interpreted to include only things of the same kind, class, character, or nature as those specifically enumerated." *Neal v Wilkes*, 470 Mich 661, 669 (2004) (cleaned up). With "public emergency" as the general term, the "similar" specific terms must inform the general term's scope. The ample breadth of "public emergency" is confirmed by the distinct specific terms. The broad terms used by the Legislature, in conjunction with the liberal-construction requirement in MCL 10.32, confirm that the Governor's declaration under the EPGA is appropriate.

*Fourth*, the Legislative Plaintiffs stitch together their own narrative of the history and motivations behind the enactment of the EPGA. (Pls Bypass App, pp 24–26.) Plaintiffs, of course, have told the story that helps their case, leaning heavily on a circumscribed review of prior *Governors*' understanding of the law which definitionally bears little on the *Legislature's* intent—the proper focus of statutory construction. As the Court of Claims found, the proffered history is

"particularly unpersuasive" because it "does not even address or suggest the local limit plaintiffs attempt to impose on the EPGA" and "rel[ies] on mere generalities and anecdotal commentary." (5/21/20 Ct of Claims Op and Order, p 15.)

But the accuracy or completeness of that history is fundamentally beside the point. The Legislature made its intentions in enacting the EPGA perfectly clear in the language of the statute itself, and Plaintiffs cannot rewrite those intentions to meet their own considerations. "Because the statute is clear, there is no ambiguity that would permit or justify looking outside the plain words of the statute." *In re Certified Question from US Court of Appeals for Sixth Circuit*, 468 Mich 109, 116 (2003) (cleaned up). In particular, courts "do not resort to legislative history to cloud a statutory text that is clear." *Id.* Lacking any ambiguity, the text of the EPGA, including its express directive to construe its terms broadly, controls.

*Fifth*, contrary to the Legislative Plaintiffs' argument, the doctrine of *in pari materia*, which assists in reading laws on the same subject harmoniously, is generally inapplicable to statutes that are unambiguous and do not present a "patent conflict." *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 74 n 26 (2017). And the doctrine is most profitably applied to address statutes that do not refer to each other, so this canon is employed to make sense of their interaction. See, e.g., *People v Anderson,* ___ Mich App ___ (2019) (No. 343272), slip op at *3 (the doctrine applies "even if the statutes do not reference one another").

But there is no mystery here, the second-in-time statute—the EMA—expressly explains that it does not "[l]imit, modify, or abridge the authority of the

governor to proclaim a state of emergency pursuant [the EPGA]" or any other law in place. MCL 30.417(d). Thus, the statutes themselves unambiguously tell us that they each are—and must be read as—independent, supplementary, and non-conflicting grants of authority to the Governor. This understanding of the EMA and EPGA as overlapping authorities makes practical sense too, as the unforeseen discovery of statutory gaps in the midst of an emergency or disaster could be devastating. Better to, as the 1976 Legislature made clear with MCL 30.417(d), complement one authority with another.

The EMA provides for a more extensive structure of governmental action in response to an emergency, and a more detailed set of powers for the Governor to implement in that response. The EMA, however, expressly ensures that, underlying the mechanisms it provides for activating implementing state and local emergency response resources, there remains the EPGA and its foundational assurance that, in times of public emergency, the executive branch is empowered to exercise the police power of the State to do what is reasonable and necessary to protect life and bring the emergency under control. The law provides more than one tool in the Governor's toolbox, without any limitation against using them in tandem.

*Sixth and finally*, and for these same reasons, the Legislative Plaintiffs' attempt to engraft the EMA's 28-day limitation period onto the EPGA must fail. There is simply nothing in the text of either statute that supports or even suggests it. The Governor's proclamation only ceases "upon declaration *by the governor* that the emergency no longer exists." MCL 10.31(2) (emphasis added). And the

Legislature, in enacting the EMA thirty years later, wisely chose to leave that characteristic of the EPGA intact. The wisdom of this legal landscape is apparent in the case of a pandemic that respects no boundaries while impacting individuals, regional health systems, and all aspects of life in severe and unpredictable ways.

## III. The EPGA contains standards that guide the Governor's exercise of authority concomitant with the nature of broad, developing emergencies and therefore survives a non-delegation challenge.

The Legislative Plaintiffs claim that the EPGA violates the separation of powers because it lacks sufficient standards to guide the Governor's decision-making, in violation of the non-delegation doctrine. Ample caselaw disagrees.

### A. The branches of government are not barred from working together, and sharing their authority is permitted so long as adequate guidance is given.

The Michigan Constitution provides for the separation of powers among the three branches of state government. In particular, the Constitution provides:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch. [Const 1963, art 3, § 1.]

But Michigan courts have never interpreted the separation of powers doctrine as meaning there can never be any overlapping of functions between branches. *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 752 (1982). Rather, an overlap or sharing of power is constitutionally permissible provided that "the grant of authority to one branch is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other." *Judicial Attorneys Ass'n v Mich*, 459 Mich 291, 297 (1998); see also *id.* ("It is simply

impossible for a judge to do nothing but judge; a legislator to do nothing but legislate; a governor to do nothing but execute the laws.").

The separation of powers doctrine "ha[s] led to the constitutional discipline that is described as the nondelegation doctrine," *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 8 (2003), which the Legislative Plaintiffs claim the EPGA violates. While the legislative power—the power "to make, alter, and amend laws"—sits with the Legislature, *Harsha v City of Detroit*, 261 Mich 586, 590 (1933), both the U.S. Supreme Court and the Michigan Supreme Court "ha[ve] recognized that the separation of powers principle, and the nondelegation doctrine in particular, do not prevent Congress [or our Legislature] from obtaining the assistance of the coordinate Branches." *Taylor*, 468 Mich at 8 (internal quotes omitted).

The Michigan doctrine of non-delegation has been expressed in terms of a "standards test." *Westervelt v Natural Resources Comm*, 402 Mich 412, 437 (1978). Under this test, "legislation which contains a delegation of power to . . . [another branch] must contain either explicitly or by reference . . . standards prescribed for guidance . . . ." *Id*. at 437–438. Significantly, such standards must only be "as reasonably precise as the subject matter requires or permits." *Id*. at 438.

And the statute carries a presumption of constitutionality; it "must be construed in such a way as to 'render it valid, not invalid.' " *Id*., citing *Argo Oil Corp v Atwood*, 274 Mich 47, 53 (1935). In Michigan, like the federal system, successful nondelegation claims are exceedingly rare. See *Taylor*, 468 Mich at 9

("In the federal courts these improper delegation challenges to the power of federal regulatory agencies have been uniformly unsuccessful.")

This case presents no exception to the rule; the standards set forth in the EPGA are as "reasonably as precise as the subject matter requires or permits." *Westervelt*, 402 Mich at 439. The Legislature did not grant the Governor a blank check. The EPGA provides the Governor the authority, after declaring a state of emergency, to "promulgate *reasonable* orders, rules, and regulations as he or she considers *necessary* to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1). Accordingly, there are several limits on the Governor's authority. Her orders may come only upon a "public emergency" and the orders must not only be reasonable *and* necessary, they must be directed at protection of "life and property" or "bring[ing] the emergency situation . . . under control" in the "affected area." *Id.*

Michigan courts have consistently upheld similar language as sufficiently precise to avoid any nondelegation problem. In *G.F. Redmond & Co v Michigan Sec Comm'n*, 222 Mich 1, 7 (1923), this Court held that "the term 'good cause' for revocation of the license, relating, as it does, to the conduct of the business regulated by the policy declared in the statute, is sufficiently definite." See also *Smith v Behrendt*, 278 Mich 91, 97–98 (1936) (holding that allowing the executive to grant oversize loads for freeway travel in "special cases" was a limited and proper delegation of legislative authority). These examples suffice to reveal that the courts are hesitant to invalidate laws on the basis of an allegedly improper delegation

where the Legislature provides even a modicum of direction to the executive branch. This level of trust—in the Legislature, to delegate as it sees fit, and in the executive, to follow those guidelines—justifies a strong deference from this Court to its coordinate branches.

The Legislative Plaintiffs rely on *Blue Cross & Blue Shield of Michigan v Milliken*, which determined that "the power delegated to the Insurance Commissioner" regarding approval of actuarial risk factors "is completely open ended." 422 Mich 1, 53 (1985). And for good reason—the commissioner's authority was not guided at all. Instead, the commissioner was granted complete authority to " 'approve' or 'disapprove' the proposed risk factors; the basis of the evaluation is not addressed." *Id.* *Blue Cross* is a poor comparison.

And of course, the standards imposed on the Governor's authority under the EPGA are not read in a vacuum—the "subject matter" of the delegation guides how strictly or narrowly drawn the standards must be. *Westervelt*, 402 Mich at 439. The context of a developing "crisis, disaster, rioting, catastrophe, or similar public emergency," MCL 10.31(1), counsels granting substantial leeway to the decisionmaker. Public emergencies are not static events, nor do they unfold patiently or predictably. Response to such crises warrant—indeed require—nimbleness coupled with judgment to meet the needs of the moment. There is no specific one-size-fits-all response to a complex and ongoing emergency. This subject matter requires the broadest level of leeway permissible under the nondelegation doctrine. If "the management of natural resources is a difficult and complex task,"

*DNR v Seaman*, 396 Mich 299, 311 (1976), surely the response to a rapidly developing and ever-changing public health crisis is even more so.

The EPGA provides the Governor substantial discretion, but limits her ability to act upon a finding of an emergency, and even then only to exercise her discretion to issue "reasonable" orders "necessary" to protect "life and property" and to bring the emergency "under control." MCL 10.31(1). These guideposts are more than sufficient, and do not contemplate legislative or judicial second-guessing.

### B. The Legislature is not best equipped to address the exigencies of an emergency.

The Legislative Plaintiffs highlight the Legislature's "nature and design" as best situated to handle the ongoing public health crisis. (Pls Ct of Claims Br, p 44.) They offer the virtues of "consensus through rigorous parliamentary debate," and considerable "distillation and refinement," to make public policy choices. (*Id.*) As explained in painstaking detail by an amicus filing in the Court of Claims (Senate Democrats Caucus Br, pp 6–12), the road from an idea to a bill to an enactment is a long one, filled with procedural requirements—most notably, the constitutional requirement that each bill must sit, at a minimum, for *five days in each chamber* before it can be passed, Const 1963, art 4, § 26. Though valuable in the normal course of legislative deliberation, the response necessary to combat a fast-moving, contagious disease is agile and flexible (as well as temporary and reasonable)

action, not Robert's Rules of Order.[21] The Legislature knows that to meet the moment, proper delegation to the executive is the wisest course, which is why it granted the authorities it did to the Governor.

This Court should honor that choice. Having extolled its virtues in making public policy choices, it is incumbent on the Legislature, not this Court, to make the changes it seeks. Bicameralism and presentment are the procedures that the Legislature designed to effectuate such choices, and if it thinks it is wise to take the reins in the middle of this crisis, it should exercise its legislative authority to do so.

## IV. In the EMA, the Legislature *requires* the Governor declare a state of emergency and disaster if she finds certain conditions exist.

In addition to her authority under the EPGA, the Governor has an independent source of emergency-response authority in the EMA. In determining that the Governor acted outside of that statutory authority under the EMA when issuing Executive Order 2020-68, the Court of Claims made its only error on the merits. That error stems from an interpretation of the EMA's provision concerning the effect of the Legislature's decision not to extend the Governor's declarations of emergency and disaster. (5/22/20 Ct of Claims Op, pp 19–25.) Before review of that provision, however, an understanding of the scope of the EMA sets the background.

[21] In some emergency circumstances, even the constitutionally mandated quorum necessary to do business in the Legislature could pose logistical barriers. Const 1963, art 4, § 14.

### A. The EMA sets out a statutory game-plan for state and local emergency response, and it grants the Governor broad powers and duties to "cop[e] with dangers to the state or its people."

First enacted in 1976, the EMA sets forth several independent (though related) obligations regarding state and local responses to emergencies and disasters in the State. The Governor is not the only subject of the EMA—that act tasks county boards of commissioners, MCL 30.409, and directors in state government, MCL 30.408, among others, with emergency planning, including the designation of emergency management coordinators. See MCL 30.410. It grants those local coordinators the authority to declare a local state of emergency and permits them to, among other things, appropriate funds, provide emergency assistance to victims of a disaster, and enter into regional compacts with public and private entities to respond to the emergencies. MCL 30.410(1)(b).

Particular to the Governor, the EMA grants her the important responsibility to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency." MCL 30.403(1). This broad charge places the Governor at the forefront of emergency and disaster responsiveness and serves as a baseline for the latitude given to her by the Legislature in times of crisis. To that end, she possesses the authority to "issues executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(2). The act grants the Governor, and only the Governor, the authority to amend or rescind those orders. *Id.*

This broad statement of authority is confirmed throughout the EMA. For example, MCL 30.414(3), makes clear that the EMA "shall not be construed to restrain the governor from exercising on his own initiative any of the powers set

forth in this act." The act also emphasizes the breadth and strength it is intended to add to the Governor's preexisting emergency response authority, stating that it does not "[l]imit, modify, or abridge" the authority of the Governor to proclaim a state of emergency under the EPGA "or exercise any other powers vested in him or her under the state constitution of 1963, statutes, or common law of the state independent of, or in conjunction with, this act." MCL 30.417(d). As discussed above, the EPGA confers emergency authority on the Governor without mention of legislative involvement—a characteristic the EMA expressly preserved.

### B. If the conditions warrant it, the Governor has a duty under the EMA to declare states of emergency and disaster which actuates certain emergency response mechanisms.

Consistent with this broad authority, the Governor has the obligation to declare states of disaster and emergency if the pertinent conditions exist. She "*shall*, by executive order or proclamation, declare a state of emergency if he or she finds that an emergency has occurred or that the threat of an emergency exists." MCL 30.403(4) (emphasis added). Similarly, she "*shall*, by executive order or proclamation, declare a state of disaster if he or she finds a disaster has occurred or the threat of a disaster exists." MCL 30.403(3) (emphasis added).

Upon that order or proclamation, the law grants the Governor authority to marshal both state and federal resources to adequately deal with the danger facing the State.[22] The executive order or proclamation also authorizes the Governor to

[22] See, e.g., MCL 30.404(1) (authorizing deployment of forces and distribution of supplies); MCL 30.404(2) (the Governor may seek and accept federal assistance); MCL 30.408(1) (demanding cooperation among the state agencies).

exercise additional broad powers, including "[s]uspending a regulatory statute, order, or rule prescribing the procedures for conduct of state business" in certain circumstances, "commandeer[ing] . . . private property necessary to cope with the disaster or emergency," and "[c]ontrol[ling] ingress and egress to and from a stricken or threatened area," and "[d]irect[ing] all other actions which are necessary and appropriate under the circumstances." MCL 30.405(1)(a), (d), (g), (j).

And the EMA expressly defines "state of disaster" and "state of emergency" independently from "disaster" and "emergency." "[D]isaster" and "emergency" refer to conditions that the Governor may find to exist in the State.[23]

Distinctly, "state of emergency" and "state of disaster"—both of which were declared in Executive Order 2020-68—are defined as types of executive orders or proclamations that the Governor must issue upon finding emergency or disaster conditions exist. Per MCL 30.402(p), " 'state of disaster' means *an executive order or proclamation* that activates the disaster response and recovery aspects of the state, local, and interjurisdictional emergency operations plans applicable to the counties or municipalities affected." (Emphasis added.) Similarly, " 'state of emergency' means *an executive order or proclamation* that activates the emergency response and recovery aspects of the state, local, and interjurisdictional emergency

[23] The EMA defines both "disaster" and "emergency." Under MCL 30.402(e), " '[d]isaster' means an occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or human-made cause. . . ." "Emergency" is defined as "any occasion or instance in which the governor determines state assistance is needed to supplement local efforts and capabilities to save lives, protect property and the public health and safety, or to lessen or avert the threat of a catastrophe in any part of the state." MCL 30.402(h).

operations plans applicable to the counties or municipalities affected." MCL 30.402(p) (emphasis added).

In short, "state of emergency" and "state of disaster" are *species of executive orders* that activate certain response efforts and resources and may—indeed, must—be issued only when "emergency" or "disaster" conditions are found to exist. These statutory definitions are important to understand the interplay between the Governor's termination of her prior declarations and subsequent new declarations.

Importantly, "if [the Governor] finds that an emergency [or disaster] has occurred or that the threat of an emergency [or disaster] exists," the Governor "*shall*" declare as such in an executive order or proclamation. MCL 30.403(3), (4). Under longstanding Michigan precedent, "the word 'shall' is ordinarily construed in its imperative sense, excluding the idea of discretion." *State Bd of Ed v Houghton Lake Cmty Sch*, 430 Mich 658, 670 (1988).[24] The Governor thus has a *duty* to declare a state of emergency or a state of disaster if she determines a disaster or emergency has occurred or will occur.

And just as she is required to *declare* a state of emergency if the real-world conditions merit it, she also has the duty to "terminate" a state of disaster or emergency, i.e., such executive orders, if the conditions cease or the Legislature refuses to extend those executive orders. MCL 30.403(3), (4).

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[24] See also *Sauder v Dist Bd of Sch Dist No 10, Royal Oak Tp, Oakland Co*, 271 Mich 413, 418 (1935) (when a statute uses "shall" and "the public are interested" that charge "is imperative"); *Southfield Tp v Main*, 357 Mich 59, 76 (1959) ("The use of the word 'shall' is mandatory and imperative and when used in a command to a public official.").

### C. Pursuant to the EMA's mandates, the Governor terminated her earlier declarations and issued new ones because there was an undisputed "disaster" and "emergency" in Michigan.

As April 30 approached and with it the expiration of the declared states of emergency and disaster under the EMA, see Executive Order 2020-33, the Legislature declined to extend those executive orders, despite the lack of dispute that that the conditions in our State remained dire. On April 30, then, in accordance the mandate that the Governor "terminate" the state of emergency and disaster declarations under the EMA absent legislative extension, MCL 30.403(3), (4), the Governor so terminated. Executive Order 2020-66.

Then, since the conditions on the ground undisputedly remained dire—*just that day*, over 100 Michiganders died from the virus and over 1,100 were confirmed infected[25]—the Governor found "that an emergency [or disaster] has occurred or that the threat of an emergency [or disaster] exists," triggering her *duty* under the EMA to declare as such in an executive order or proclamation. MCL 30.403(3), (4); Executive Order 2020-68, Preamble.

In carrying out her statutory duty, the Governor acknowledged that the measures implemented pursuant to her authority under the EMA and the EPGA (like the Stay at Home order, among others) "have been effective, but the need for them—like the unprecedented crisis posed by this global pandemic—is far from over." *Id.* She emphasized the continued lack of treatment for the virus, the ease of

[25] *MLive, Thursday, April 30: Latest developments on coronavirus in Michigan*, available at https://www.mlive.com/public-interest/2020/04/thursday-april-30-latest-developments-on-coronavirus-in-michigan.html

transmission, and the "lack [of] adequate means to fully test for it and trace its spread." *Id.* Ultimately, the Governor found that "the threat and danger posed to Michigan by the COVID-19 pandemic has by no means passed, and the disaster and emergency conditions it has created still very much exist." *Id.* Given her findings and the facts on the ground, the Governor was obligated to issue the declaration.

### D. The construction of the Court of Claims and the Legislative Plaintiffs adds limitations on the Governor's authority that the Legislature did not impose.

The Court of Claims erroneously ruled that the Governor was barred from issuing Executive Order 2020-68. Because the Legislature did not extend the emergency and disaster declarations set to expire on April 30, the Governor terminated them, just as she was required to do. *Id.* But her duty to issue states of emergency and disaster plainly remained, and was not the subject of those terminated declarations. So, because of the duty to issue such declarations whenever the conditions warrant it—the law states that she "shall" do so—she immediately issued new orders declaring states of emergency and disaster. *Id.*

The Legislative Plaintiffs' position—that their refusal to extend requires not only termination of the executive orders, but bars the Governor from issuing distinct and subsequent executive orders—finds no mention in the text. (5/21/20 Ct of Claims Op at 23.) Rather, the Legislature seeks to engraft a *second* effect of their refusal to extend the Governor's executive orders: the negation of her duty to respond to emergencies under the EMA.

To illuminate the legal error (and the real-world stakes) in an all-too-possible factual context, barring the Governor from declaring a state of emergency or disaster on the same subject matter of a prior, un-extended declaration would prohibit her from activating the EMA's emergency response resources to combat COVID-19, no matter how badly or urgently those resources are needed. *How long* would the Governor have to wait from the earlier termination before enough time had passed, if the Plaintiffs and the Court of Claims are correct that a minute is simply not long enough? How about a day? A week? Six months? No time period exists in the statute, and this Court should not add some extra-textual time-lapse before the Governor may fulfill her statutory duty to the State and its residents.

Nor is there any requirement in the statute, express or implied, that the Governor's duty to declare an emergency or disaster may spring back up, but only if the *conditions change*. (5/21/20 Ct of Claims Op at 23.) And in the absence of any statutory guidance, how is the Governor to know, or a court to review, whether the conditions have sufficiently changed? The EMA does not contemplate this, nor would it make any sense as a matter of emergency response; the decision to declare states of emergency and disaster is entrusted to the sound discretion of the Governor and is based, as it should be, on what the existing conditions require, not on whether they have changed in some undefined and uncertain way. Imposing such extra-textual rules about how and when a Governor can reactivate needed emergency response resources is both unwarranted and dangerous.

Public health experts warn of a possible second wave of this pandemic. The existence of such unknowns and uncertainties about the future impact of the coronavirus (as with many emergencies or disasters) further supports reading the law as it is, not as the Legislative Plaintiffs would like it to be. The Legislature wrote the law; the Governor followed it. Only the Legislature may amend it.

The Governor is not granted her emergency authority without limit, as the Legislative Plaintiffs' seemingly warned below. Indeed, although the Governor "shall" declare an emergency or disaster "if he or she finds" that an emergency or disaster has occurred or threat of either exists, she is not empowered to declare either in the absence of the conditions precedent. MCL 30.403(3) and (4). These clear textual limitations should mute the siren-decibel lamentations of the Governor's purported "tyranny." (Pls Ct of Claims Br, p 41.)[26]

And while a Governor's factual finding of an emergency is entitled to great deference, it is not beyond judicial review. *Straus v Governor*, 459 Mich 526, 533 (1999), quoting *People ex rel Johnson v Coffey*, 237 Mich 591, 602 (1927) ("The Governor holds an exalted office. To him, and to him alone, a sovereign people has committed the power and the right to determine the facts in the proceeding before us. His decision of disputed question of fact is final. His finding of fact, *if it has*

[26] The Legislative Plaintiffs bludgeon the Governor's supposed creation of "new crimes" and for criminalizing violation of her executive orders. (Pls Ct of Claims Reply Br, pp 4, 23–24.) Yet, it is *the Legislature* that criminalized violation of a Governor's executive orders. MCL 30.405 (willfully disobeying or interfering with an order of the Governor is a misdemeanor); MCL 10.33 (violation of Governor's orders "shall be punishable as a misdemeanor" where so stated).

*evidence to support it*, is conclusive on this court.") (emphasis added). If a party disputes the factual support for the Governor's findings supporting a declaration, it may attempt redress in the courts. But, again, the Legislative Plaintiffs have agreed that emergency and disaster conditions exist.

### E. The Legislative Plaintiffs' responsive arguments do not fully account for the language of the act.

The Legislative Plaintiffs made several arguments below why the Governor's April 30, 2020 declaration of a state of emergency and state of disaster under the EMA are void. None have merit.

#### 1. No piece of the EMA is invalidated or rendered nugatory.

The Court of Claims agreed with the Legislative Plaintiffs' contention that, under the Governor's reading, the concurrent-resolution procedure for extending states of emergency and disaster beyond 28 days in MCL 30.403(3) and (4) is rendered meaningless. (5/21/20 Ct of Claims Op and Order, p 24.) Not so.

First, the lack of legislative extension after 28 days *forces* the Governor to terminate those executive orders. That is no mere technicality. This mechanism is a tool to hold the Governor accountable if the conditions supporting a declaration are questionable, or completely lacking. Recall that the declaration "shall" include an explanation of the conditions causing the disaster or emergency and the area affected. MCL 30.403(3) and (4). Therefore, by refusing to extend a declared state of emergency or disaster, the Legislature can force the Governor to prove her

insistence that an emergency or disaster has not abated, creating an interbranch dialogue on a matter of utmost public importance.[27]

But that is not the circumstance before the Court—the Legislative Plaintiffs have not denied that Michigan faces a dire public health threat, nor could it in good faith do so. Nonetheless, the Legislature withheld. The statute it drafted, though, does not allow that withholding to override the Governor's duty to declare states of disaster and emergency, and to cope with the dangers facing the State, when the conditions on the ground warrant it. And wisely so. In a wildfire, the firefighters holding the hose do not pack up if someone shuts off a ringing alarm. Instead, they fight the spread and respond to the conditions as they are.

The lack of legislative extension after 28 days also serves another purpose. It forces the Governor not only to show her work to the Legislature, but to explain to the People the grounds for any renewal of the declarations. This is because all emergency or disaster proclamations must be "disseminated promptly" to "bring its contents to the attention of the general public." *Id.* Thus, at least every 28 days, her justifications must be manifest to the whole State, to whom she answers.

Of course, this Court has recognized that it "is not to second-guess those policy decisions or to change the words of a statute in order to reach a different result." *People v Harris*, 499 Mich 332, 345 (2016). If the Legislative Plaintiffs now complain that the language they wrote grants them an insufficient measure of

[27] Ultimately, as discussed above, this is a determination that, while subject to great deference, is within the courts' authority to review. See *Straus*, 459 Mich at 533; *Coffey*, 237 Mich at 602.

control over the Governor's handling of an emergency or disaster, it is up to the Legislature, not this Court, to modify its statutes.

The Legislature had several options for writing its law differently. It could have set an expiration period on her *legal duty* to declare an emergency, rather than on the just the declaration. Or it could have *prohibited* the Governor from issuing a substantively similar declaration if the Legislature did not extend the earlier one. It could have constructed the definitions of "state of disaster" and "state of emergency" differently. But the 1976 Legislature wisely did not draft so inflexible and short-sighted a statute. Myriad unforeseen disasters and emergencies awaited future generations, so the Legislature's words *requiring* the Governor to issue a declaration where the real-world implications persist was a humble acknowledgement of our predictive limitations, and a trust in the one statewide office equipped to lead a coordinated response.

**2. The Governor's construction does not yield absurd results.**

Below, the Legislative Plaintiffs leaned on the concept of absurd results (Pls Ct of Claims Br, pp 21–23), arguing that the Governor issued contradictory orders by simultaneously terminating and declaring states of emergency and disaster. But this, again, shows a misunderstanding both of the Governor's declarations and of the language of the EMA. Even if the absurd results doctrine exists in Michigan, *Johnson v Recca*, 492 Mich 169, 193 (2012) (questioning that premise), it involves a high standard: "[a] result is only absurd if it is quite impossible that the Legislature could have intended the result," *id.* (cleaned up).

Again, "state of emergency" and "state of disaster" are, by statutory definition, types of "executive orders." MCL 30.402(p) and (q). And as the Governor made abundantly clear in Executive Order 2020-66, the termination of her previously declared states of emergency and disaster was not driven by any belief that the emergency and disaster conditions requiring them had ceased to exist. Rather, per the EMA, she terminated those executive orders only because the Legislature refused to extend them. MCL 30.403(3) and (4). Accordingly, Executive Order 2020-66 complies stringently with the law. The Legislature wrote the rules; the Governor followed them.

### 3. If the Legislative Plaintiffs are right about the authority to effectively veto the Governor's declarations under the EMA, the Legislature retained an unconstitutional legislative veto under *Chadha* and *Blank*.

The Legislative Plaintiffs read the EMA's concurrent-resolution extension mechanism as a means for the Legislature to force the termination not only of certain orders, but of the Governor's substantive emergency response authority under the EMA. This reading not only goes beyond contradicting the EMA's plain text—it is unconstitutional. As discussed above, the Legislature may share its constitutional authority with the Governor provided it prescribes standards for guidance that are reasonably precise in light of the subject matter of the delegation. But once the Legislature does so, it may not retain what amounts to a legislative veto. *Blank v Department of Corrections*, 462 Mich 103, 113 (2000). If the Legislative Plaintiffs are correct about their interpretation of the concurrent-resolution provision, then that body has not just kept a modicum of oversight, but a

"right to approve or disapprove" the Governor's exercise of delegated authority—and to do so without itself abiding by constitutional requirements of bicameralism and presentment. *Id.* Such invasive oversight would violate our Constitution.

In *INS v Chadha*, 462 US 919 (1983), the U.S. Supreme Court evaluated whether the Constitution permitted Congress to delegate authority to the executive but permit one house of Congress to retain veto authority over the actions of the executive. The Court held that such a maneuver violated the principle of bicameralism and presentment. *Id.* at 959. Just as in *Chadha*, where there was "[d]isagreement with the Attorney General's decision on Chadha's deportation—that is, Congress' decision to deport Chadha," here, the Legislative Plaintiffs disagree with the Governor's decision to declare states of disaster and emergency in Michigan and to activate the response resources that accompany those declarations. *Id.* at 954. Such "determinations of policy" by legislative branches may be implemented "in only one way": bicameral passage and presentment to the President (or Governor). *Id.* at 954–955. "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." *Id.* at 955.

In *Blank*, this Court applied the framework in *Chadha* in considering the constitutionality of a 1977 amendment to the Administrative Procedures Act, which required an administrative agency to "obtain the approval of a joint committee of the Legislature or the Legislature itself before enacting new administrative rules." 462 Mich at 108 (Kelly, J.). The Court framed the issue as follows: "[W]hether the Legislature, upon delegating [rulemaking authority to an executive-branch agency],

may retain the right to approve or disapprove rules proposed by [the agency]." *Id.* at 113. The plurality opinion ultimately answered that question in the negative, finding that the Legislature's approval or disapproval of an executive-agency rule is "inherently legislative" and therefore "subject to the enactment and presentment requirements of the Michigan Constitution." *Id.* at 115–116.

The same conclusion holds for any determination by the Legislature that the Governor can no longer exercise the emergency powers the Legislature has vested in her through the EMA. Effectuating such an inherently legislative determination requires legislative action, and "[w]hen the Legislature engages in 'legislative action' it must do so by enacting legislation." *Id.* at 119. "[T]he Legislature cannot circumvent the enactment and presentment requirements [that must accompany legislative action] simply by labeling or characterizing its action as something other than 'legislation.' " *Id.* The Legislative Plaintiffs thus cannot complain that the EMA's concurrent-resolution procedure has not been given the effect they would like it to have, because that effect—a legislative veto of the Governor's delegated authority—would be unconstitutional.

The Court of Claims erred in concluding that "[t]he 28-day limit is not legislative oversight or a 'veto' of the Governor's emergency declaration; rather, it is a standard imposed on the authority so delegated." (5/21/20 Ct of Claims Op and Order, p 25.) But that conclusion is a consequence of the erroneous determination that the legislative extension provision does more work than the text provides. The Legislature's withholding only results in the termination of certain executive

orders; it does not operate as a "stop" button on the duty the Legislature delegated to the Governor to respond to emergencies and disaster. The Legislature "must abide by its delegation of authority until that delegation is legislatively altered or revoked," *Chadha*, 462 US at 955, through the means set forth in the Constitution.

* * *

The Legislative Plaintiffs ask this Court to nullify the Governor's declarations and all of the executive orders derived from them, like the incrementally loosening Stay Home Order, among others. The emergency and disaster declarations issued by the Governor were executed after careful consideration of the unique nature of the threat facing Michigan and the advice of numerous individuals and entities with unique expertise. To judicially strip the Governor of her authority, contrary to her clear legal obligations, would not just upset the separation of powers, it would work grievous harm on the State and its citizens. If asking this Court to strike down its own statute as unconstitutional is not ironic enough, the Legislative Plaintiffs come to the judiciary seeking a shortcut to do something it already has the power to do—amend the challenged laws.

Because both emergency acts grant the Governor the authority she has exercised, and because she has stringently abided by the very terms the Legislature used in granting that power, this Court should hold that the Governor's executive orders were proper.

## CONCLUSION AND RELIEF REQUESTED

The Governor asks this Court to grant the bypass applications, determine that the Michigan House of Representatives and Michigan Senate do not have standing, and hold in the alternative on the merits—that the Governor's Executive Orders 2020-66, 2020-67, and 2020-68 are validly issued orders under the EPGA and EMA.

Respectfully submitted,

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